

## PROBLEMS OF JUDICIAL INTERPRETATION OF SIGNS OF LEGALIZATION (LAUNDERING) OF MONEY OR OTHER PROPERTY ACQUIRED BY CRIMINAL MEANS

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The subject. The article is devoted to analysis of the crime – laundering of money or other property obtained by criminal means, – punished by Art. 174, 174.1 of the Russian Criminal Code.

The purpose of the article is to confirm or disprove hypothesis that the current Supreme Court’s official legal interpretation of the rules on the laundering of criminal incomes is too narrow; this interpretation is based on a distorted understanding of the objectives of the analyzed criminal acts.

The main results and scope of their application. According to judicial practice of the Supreme Court of the Russian Federation, firstly, when the money obtained by illicit trafficking of narcotic drugs were cashed by accused person using electronic payment systems, bank accounts or debit cards, and subsequently were spent there is no corpus delicti of money laundering. Secondly, the corpus delicti of money laundering exists in cases when money obtained by criminal means, are invested to capital stock or companies, to a bank deposit, to purchase of income-generating assets, goods or property.

Conclusions. The specificity of the situation with criminal responsibility for the legalization of criminal incomes is in the fact that it is possible to use criminal income for personal needs for the purchase of luxury goods directly and without legalization due to the lack of control over the citizens expenditures in the Russian Federation. So direct disposal and personal use of property obtained during a crime by criminal in his own needs should not be qualified under Art. 174, 174.1 of the Russian Criminal Code as money laundering if the purpose of concealing the criminal nature of assets was not proven. However, when making financial transactions or other transactions designed to disguise the criminal source of income, the intention of criminal to spend them on personal needs should not exclude the application of the analyzed norms of criminal law.

## 1. The statement of the problem.

The subject of the analysis in this Article is the current practice of the Supreme Court of the Russian Federation, according to which:

– in criminal cases of crimes related to illicit trafficking in narcotic drugs and psychotropic substances, where the accused money received by criminal means, cashed using electronic payment systems, bank accounts and cards, and subsequently spent on personal needs, there is no offense under Art. 174.1 of the Criminal Code;

– the crimes provided by Art. 174, 174.1 of the Criminal Code, can be formed in those cases when the money received by criminal means, for example, are brought in authorized capital of the organization, on the bank deposit; the assets bringing the income are acquired, money is directed on purchase and the subsequent sale of goods, property, performance of works and rendering services.

As it seems, the designated position of the Supreme Court of the Russian Federation is controversial and leads to a restrictive interpretation of the provisions of Art. 174, 174.1 of the Criminal Code, which prevents the effective application of the relevant rules and generates judicial errors, referred to in theory as "non-qualification" [1].

## 2. Judicial interpretation of signs of legalization (laundering) of money or other property acquired by criminal means.

One of the key examples of case law on the subject stands appeal the verdict of Judicial Board on criminal cases of the Supreme Court of 13.09.2018 № 127-АПУ18-8 against Abdurakhmanov E. R., under which the defendant was acquitted of the offence under Article 174.1 of the Criminal Code, with the following motivation: "a crime under Article 174.1 the Criminal Code of the Russian Federation, belongs to the sphere of economic activity and its necessary element is the purpose of involvement of money and other property received as a result of commission of crime in legal economic turnover. For the presence of this crime requires not just financial transactions and transactions with property obtained by criminal means, and actions aimed at establishing,

changing or termination of civil rights and obligations, giving them the appearance of legality (making the authorized capital of the organization, a bank deposit, purchase of assets that generate income, purchase and subsequent sale of goods, property, works, services).

It is in this way that legalization as a criminal act differs from the main crime committed with the use of financial institutions, the purpose of which is conspiracy as a way of obtaining income.

Proceeding from explanations of Plenum of the Supreme Court of the Russian Federation containing in the Resolution of July 7, 2015 No. 32 "On judicial practice on cases of legalization (laundering) of the money or other property acquired by criminal means and about acquisition or sale of the property which is obviously got by criminal means" (para. 11) the order of the money received by criminal means for personal consumption (acquisition of food, essential goods, receiving household services, etc.) doesn't form the specified structure of crime".

We believe that this judgment contains a controversial interpretation of the provisions of the offense under Art. 174.1 of the Criminal Code. The following arguments contained in it can be questioned:

1. The purpose of the criminal act under Art. 174.1 of the Criminal Code is to involve funds and other property obtained as a result of the crime in the legal economic turnover;

2. This purpose distinguishes legalization from the main crime committed with the use of financial institutions, the purpose of which is conspiracy as a way of generating income. It can be concluded from the above that the position of the Supreme Court of the Russian Federation regarding the considered corpus delicti is that conspiracy is not considered as one of its possible goals.

3. In the appeal the sentence given to the interpretation of the provisions of para. 11 of the resolution of Plenum of the Supreme Court of the Russian of July 7, 2015 № 32 "On judicial practice in cases on legalization (laundering) of money or other property obtained by criminal means and on the acquisition or sale of property knowingly obtained by criminal means", excluding the use of legalized property for personal purposes even after the

completion of the process of legalization.

### **3. Scientific interpretation of signs of legalization (laundering) of money or other property acquired by criminal means.**

#### **3.1. The purpose of legalization (laundering) of money or other property acquired by criminal means**

As it seems, the doubtfulness of the first of the given arguments is connected with the fact that the purpose of the analyzed crime in Art. 174, 174.1 of the Criminal Code is designated as giving a lawful form to the possession, use and disposal of the specified funds or other property. Thus, the purpose of legalization, as it is formulated in the criminal law, does not fully coincide with the purpose of legalization, indicated in the above-mentioned appeal sentence. In the latter, it is designated as the introduction of funds or other property acquired by criminal means into legal economic circulation.

The purpose of giving a lawful form to the possession, use and disposal of these funds or other property is disclosed in the scientific literature as follows.

N. V. Yusupov indicates that the legalization (laundering) of property obtained by criminal means, is the Commission by a person of actions aimed at "introduction into legal circulation of property, knowingly acquired by criminal means, in order to give a legal form to the source of origin of the property" [2, p. 8]. At the same time, the main methods of legalization (laundering) of funds received from illegal drug trafficking, the author calls "investing these funds in business (tourism, trade, industry); in the purchase of expensive property (real estate, cars, jewelry); return of fictitious loans; opening accounts in banks to bearer or fictitious persons, as well as correspondent accounts in foreign banks" [2, p. 9].

Yu. V. Bystrova interprets legalization as "the actions of the entity performing financial transactions and other transactions with property acquired by criminal means, in order to hide the connection of such property with predicate crimes, conceal their consequences and evidence, create the illusion of the legality of the origin of property

for its subsequent introduction into civil circulation" [3, p. 8].

In accordance with the position of V. I. Tretyakov, "legalization of criminal incomes is a kind of link between the open economy and the criminal sector of the shadow economy. This is a channel through which the proceeds from criminal practice are transferred to the legal sphere of economic relations, thereby supporting both legal and criminal business" [4, p. 37]. At the same time, the author notes that not all funds and other property obtained by criminal means should be laundered. Some of them can be directed "to additional expenditure payments associated with the operation or can be spent for personal purposes for the purchase of expensive cars, jewelry, gifts to friends" [4, p. 38]. V. I. Tretyakov especially draws attention to the fact that the main purpose of legalization is to hide the criminal nature of the origin of income, which is achieved through their introduction into the legal economic turnover [4, p. 40].

A. V. Smagina, analyzing the objective side of legalization, the mechanism of its implementation, indicates that "it consists of investing cash in legal money circulation, masking the place and mechanisms of "laundering" and combining the invested criminal proceeds with legal capital. At the same time, such methods as opening of bank accounts for figureheads, registration of firms for deceased persons, carrying out operations through offshore companies, actions related to fictitious bankruptcy, distortions of accounting, Bank reporting, conclusion of fictitious contracts are often used [5, p. 14].

A. N. Lisin, in formulating their point of view on the objectives of legalization, indicates that they assume that "concealment of traces of origin of proceeds derived from illegal sources; creation of visibility of legality of receipt of proceeds; the concealment of persons who illegal income and initiating the process of laundering; creation of conditions for secure investment into legal business" [6, p.7].

V. B. Bukarev on the analyzed issues says the following: "The very fact of a financial transaction or other transaction, or the use of proceeds from crime in business or other economic activity, should not be considered legalization, if there is no sign of "giving

a legitimate form" of the income received. The essence of legalization for the offender is to make all efforts aimed at making it difficult to identify the criminal origin of money or other property (income), and the creation for themselves or other persons of such conditions of concealment or distortion of the true nature, source, location, method of disposal, movement, rights to property or ownership, which allow to consider these incomes acquired legally" [7, p. 10].

D. R. Kuzakhmetov points out that one of the goals of the legalization process is the concealment of a predicate criminal act, as a result of which the offender had money or other property [8, p. 16].

A. A. Ganikhin expresses the position that the reference in Article 174 of the Criminal Code to the special purpose of this crime excludes the possibility of bringing to responsibility for legalization in transactions with such property in the sphere of criminal turnover, since the fact of giving a legal form to criminal income does not occur here [9, p. 8].

On the basis of the foregoing, it can be concluded that the purpose of legalization, designated in the criminal law as giving a lawful form to the possession, use and disposal of criminal proceeds, is not identical to the purpose of introducing the same proceeds into legal economic circulation, since the latter does not include the "element of conspiracy", the direction of the act related to money laundering or other property obtained by criminal means, to conceal the source of such proceeds and the fact of committing a predicate offence.

Similar provisions are currently formulated in paragraph 10 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of 07.07.2015 No. 32 (ed. of 26.02.2009), according to which "under the purpose of giving a lawful form to the possession, use and disposal of funds or other property acquired by criminal means (as a result of a crime), as a mandatory feature of the crimes provided for in Articles 174 and 174.1 of the Criminal Code, it should be understood the concealment of criminal origin, location, movement of property or rights to it. This purpose may be established on the basis of the factual

circumstances of the case, indicating the nature of the financial transactions or transactions, as well as other related actions of the perpetrator and his accomplices, aimed at concealing the fact of the criminal acquisition of property and ensuring the possibility of its free circulation."

In addition, with respect to the specified resolution of Plenum of the Supreme Court, P. S. Jani, M. A. Filatov indicate the following: "the understanding of the Plenum's composition of legalization suggests that, in the opinion of the Supreme court, whenever a person makes a deal with knowingly criminally acquired or other persons property, it is almost inevitably pursues specified in Articles 174 and 174.1 of the Criminal Code the purpose of giving lawful appearance to possession, use or disposition of the specified property" [10].

Thus, on the basis of the foregoing, it is possible to directly link the purpose of giving a lawful form to the possession, use and disposal of property with the concealment of the criminal source of its origin.

### **3.2. Actions forming the objective side of legalization (laundering) of money or other property acquired by criminal means**

It is also not clear what is meant by legal economic turnover in the situation under consideration. We believe that in the right context, this term was used by V. I. Tretyakov, who pointed out that the concealment of the criminal nature of the origin of income during legalization is achieved through their introduction into legal economic circulation [4, p. 40]. Thus, in relation to the offences provided for in Art. 174, 174.1 the Criminal Code of the Russian Federation, the introduction of property in the legal economic turnover should be considered as a set of actions that make up the objective side of legalization, rather than the purpose of criminal activity provided for by the analyzed norms.

In this regard, it is appropriate to consider what constitutes economic turnover. Such an author as O. M. Krylov points out in this regard the following: "the Concept of turnover is revealed in some normative legal acts in relation to certain subjects. We give relevant examples. Thus, the

turnover of ethyl alcohol, alcohol-containing and alcoholic products – is the purchase (including imports), supply (including exports), storage, transportation and retail (art. 2 Federal law of 22 November 1995 No. 171-FZ "On state regulation of production and circulation of ethyl alcohol, alcoholic and alcohol-containing products and on restriction of consumption (drinking) of alcoholic products"). Circulation of information products is the provision or distribution of information products, including its sale, lease, rental, distribution, issuance from the funds of public libraries, public display, public performance, distribution through broadcasting or cable broadcasting, information and telecommunication networks, including the Internet, and mobile radio communication networks (Article 2 of the Federal law of December 29, 2010 N 436-FZ "On the protection of children from information harmful to their health and development"). Turnover of narcotic drugs, psychotropic substances – development, production, production, processing, storage, transportation, transfer, issue, sale, distribution, acquisition, use, import to the territory of the Russian Federation, export from the territory of the Russian Federation, destruction of narcotic drugs, psychotropic substances, permitted and controlled in accordance with the legislation of the Russian Federation (Art. 1 of the Federal law of January 8, 1998 № 3-FZ "On narcotic drugs and psychotropic substances") [11]. Summarizing the above, agreeing in this regard with such an author as B. V. Shagiev, O. M. Krylov concludes that the concept of turnover of various objects in normative legal acts is usually disclosed by listing individual operations with these objects, "i.e. a set of interrelated actions aimed at achieving a local goal and solving a more or less separate task within the legal process" [11].

Thus, legalization is a set of actions related to the introduction of property into legal economic circulation, through which the legal form of ownership, use, disposal of property obtained by criminal means is given.

This set of actions, through the implementation of which is the introduction of assets into the legal economic circulation, is guilty

of the implementation of financial operations or other transactions, characteristics and types which is given in clauses 6, 10 Resolutions of Plenum of the Supreme Court from 07.07.2015 No. 32 (ed. by 26.02.2019).

Actions committed in the process of legalization, including, can be manifested: in the acquisition of real estate, works of art, luxury goods; in the falsification of the grounds for the emergence of rights to money or other property acquired by criminal means (as a result of a crime), including civil contracts, primary accounting documents, etc.; in the Commission of financial transactions or transactions for the cashing of funds acquired by criminal means (as a result of the Commission of the crime), including using the current accounts of one-day firms or accounts of individuals who are not aware of the criminal origin of the relevant funds; in the Commission of financial transactions or transactions involving figureheads who are not aware that the funds and other property involved in the relevant financial transactions and transactions are acquired by criminal means (as a result of the Commission of the crime); in financial transactions or transactions using electronic means of payment, including those belonging to persons who are not aware of the criminal origin of electronic money.

At the same time, the highest court pays special attention to the fact that the Commission of the previously mentioned financial transactions or transactions in itself cannot prejudice the court's conclusions about the guilt of a person in the legalization (laundering) of money or other property acquired by criminal means. In each case, it is necessary, taking into account all the circumstances of the case, to confirm that the person knowingly for him made a financial transaction or transaction in order to give a legal form to the possession, use and disposal of these funds or other property.

It is appropriate to interpret as follows: we are unable to conclude that the offences specified in Articles 174, 174.1 of the Criminal Code, can be formed only in cases when money laundering is brought in the authorized capital of the organization, the Bank Deposit when they purchased the assets, income, or they are directed to the purchase and subsequent sale of goods, property, performance of works and rendering of

services. Cashing of funds using electronic payment systems, Bank accounts and cards, based on their characteristics, can also be an objective side of legalization, if committed to achieve the above goals.

The author such as M. A. Filatova also confirms this point of view, pointing out that the courts often come to the conclusion that the transfer from one account to another is the disposal of their funds regardless of how they were received, and such an order is covered by the composition of predicate crimes. However, actions on the order of criminally acquired property in the objective side of such acquisition (for example, when receiving a bribe, embezzlement, acceptance of payment for murder committed for hire) should not be included. And, in addition, from the point of view of the nature of the funds held in Bank accounts, they act as the right of the client's claim to the Bank. Consequently, the transfer from one account to another is a transaction with the Bank, as the amount of claim rights on both accounts changes. This conclusion is also applicable to the crediting of cash to the Bank account of the Bank [12].

In the situation analyzed by us, the court found the following: "Abdurakhmanov received a fee in the form of a cryptocurrency through the bitcoin payment system. On exchanges, the cryptocurrency Abdurakhmanov converted into rubles and through the payment system "Kiwi" transferred to an electronic wallet in JSC "Kiwi-Bank", tied to his subscriber phone number. Then the money was transferred to his Bank account, where it was subsequently transferred to his card in PAO ... . The received money transfers Abdurakhmanov cashed in ATMs and spent on personal needs – paid for mobile services, purchased various food, other things for personal consumption, for the treatment of the mother. The money he received was his livelihood.

The method chosen by Abdurakhmanov to receive money (using various payment systems, accounts and his Bank card) does not refute this conclusion, since the ultimate goal was to receive money and spend it for personal needs, in everyday life."

The key argument that served as the basis

for proving the absence in the actions of Abdurakhmanov E. R. of the crime under Art. 174.1 of the Criminal Code, was the Commission of financial transactions, in fact, covered by the objective side of the analyzed crime, but aimed at obtaining money on hand for spending them for personal needs.

And then we come to the question of an accurate interpretation of the provisions of paragraph 11 of the above resolution of the Plenum of the Supreme Court, as well as to the question of what value the purpose of using the proceeds of crime should have for the interpretation of the signs of Art. 174, 174.1 of the Criminal Code.

As R. V. Zhubrin points out, the analysis of the practice of investigating the legalization of criminal proceeds shows that the most common mistake is imputing the legalization of criminal proceeds without establishing the purpose of giving a lawful form to the possession, use and disposal of them, in cases of using such proceeds for personal needs or continuing criminal activity [13].

Further analyzing the issues under consideration, in his other work, R. V. Zhubrin points out the following: "the Peculiarity of laundering is the concealment of the criminal origin of property by introducing it into legal, not criminal turnover, which makes the legalization of criminal proceeds a specific type of illegal activity. The legalization of criminal incomes has practically no economic sense, criminal incomes in this case are not used for the reproduction of criminal capital, not for personal consumption, but are withdrawn from the production and consumer funds of the criminal economy for the purpose of laundering. Then with criminal income transactions and financial transactions are made, which are aimed at creating the illusion of the legality of their receipt and possession. After legalization, criminal proceeds can be used in any legal way: invested in economic activities, directed to consumer spending" [14].

Thus, the use of the proceeds of crime for personal needs can exclude the imputation of legalization only in one case: if they are used by the guilty person for such purposes immediately after receiving them by criminal means and have not been previously legalized.

If the criminal proceeds are directed by the

guilty for personal needs, but after the Commission of a complex of financial transactions or other transactions, including those related to the cashing of funds, which are designed to hide the criminal source of the origin of such income, there should be no obstacles to imputing the composition of legalization.

If we do not agree with this statement, we must come to the paradoxical conclusion that the proceeds of crime, in principle, cannot be used by the guilty for personal needs. They should be left permanently deposited, property acquired by criminal means should be infinitely resold, without using for personal purposes as a result of the money received, which would deprive the criminal act committed sense.

On the basis of the above it can be concluded that the use of criminal proceeds for personal needs after the completion of the legalization process should not exclude the imputation of a crime under Art. 174, 174.1 of the Criminal Code.

We also point out that the conclusion can be confirmed by citing the reasoning on the issue of such an author as I. A. Klepitsky, indicating that for the first time the rule on criminal liability for the legalization of criminal proceeds in Russia was put into effect in connection with the entry into force of January 1, 1997 of the current Criminal Code. However, as the author notes, "at the same time there were no social and economic prerequisites for criminalization of such actions in the country. The state of financial control was such that criminals did not need to launder money. They built expensive houses, bought expensive cars, bought shares of banks and other organizations, spent large sums of money for other purposes, without fear of being prosecuted for it. In law enforcement practice, the principle prevailed: "not caught - not a thief." There was simply no money laundering in Russia, as there was no need for it (moreover, the proceeds from legal activities were massively diverted into the shadows). Therefore, neither the legislator nor the law enforcement officer simply did not understand the essence of this crime, possible in economic relations, so strikingly different from ours. This explains the errors both in the legislative definition and in the

practice of applying the norm provided for in Article 174 of the Criminal Code. In the original version, it provided for liability for any transactions with property acquired knowingly illegally, as well as for the use of such property in business and other economic activities. Such a broad definition of the elements of the crime allowed the application of this rule (in conjunction with the rule on the predicate offence) in almost any case of the Commission of a mercenary crime (and even any other offence) " [15].

#### 4. Conclusions.

Thus, the specifics of the situation with criminal liability for the legalization of criminal income is that the appropriate income for personal needs, for the purchase of luxury goods, can be used directly, condition for which is created by insufficient control over the costs of citizens in the Russian Federation. For this reason, acts related to the direct disposal and use for personal needs of property obtained in the commission of a crime, without the purpose of concealing the criminal nature of its origin, should not be qualified under Art. 174, 174.1 of the Criminal Code. However, in financial transactions or other transactions designed to disguise the criminal source of income, the intention of the perpetrator in the end to spend them on personal needs should not exclude the application of the analyzed provisions of the criminal law.

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